

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-186013

DATE:

MATTER OF: Winton Lee Slade - Overtime Pay

DIGEST:

In order to succeed in a claim for overtime compensation, an employee must at least show that he was induced by his superiors to work beyond his normal working hours. If there is no more than a tacit expectation that an employee should work beyond his normal working hours, it is not sufficient to meet the requirement of 5 U. S. C. § 5542, that overtime be officially ordered or approved.

This matter arises from a request for reconsideration of Settlement Certificate Z-2573340, issued by our Transportation and Claims Division (now Claims Division) on July 24, 1975, which denied Mr. Winton Lee Slade's claim for backpay for work allegedly performed outside his normal 40-hour workweek.

Mr. Slade was employed as a forester with the Forest Service of the United States Department of Agriculture, at the Stuart Nursery, Pollock, Louisiana. He claims overtime pay from 1964 until his retirement on December 31, 1973. In essence, Mr. Slade alleges that he performed various duties almost every day during the period of his claim, outside of, and in addition to, his normal working hours, for which he was not compensated. His total claim is for \$158,310.92, for 10,698 hours of alleged overtime.

It is difficult to summarize the duties allegedly performed by Mr. Slade. He claims overtime for performing a multitude of duties all related to the work of a forest nursery. He alleges that he performed these duties at a uniform rate year round. Mr. Slade has presented no records specifically supporting his claims. He has not presented a diary or any other contemporaneously prepared record documenting his claimed overtime.

Mr. Slade has submitted approximately 20 signed statements from people who either work at or were otherwise associated with the Stuart Nursery during the period of Mr. Slade's claim. These statements are generally not specific, in that they do not give specific times and dates when Mr. Slade performed overtime work.

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Essentially the statements merely recite that, in the opinion of each of the individuals, Mr. Slade did a good job and worked a great deal of overtime. Some of the statements opine that Mr. Slade's superiors were aware of the overtime he was working.

Included in the Forest Service report are statements from Mr. Slade's supervisors Mr. Bruce A. Macko and Mr. J. Lamar Beasley. Each specifically denies ordering Mr. Slade to perform overtime work, other than that which was specifically approved, and for which he has been paid. Neither supervisor is aware that Mr. Slade performed any voluntary overtime.

Payment for overtime work is authorized by 5 U. S. C. § 5542 (Supp. I, 1971) which provides, in pertinent part, that:

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work * * *."

At all times relevant to Mr. Slade's claim, the above standard was applicable. In order to be compensable, overtime must be "officially ordered or approved."

The controlling definition of what constitutes "officially ordered or approved" is found in Baylor v. United States, 198 Ct. Cl. 331 (1972), where the court states:

"* * * if there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes 'officially ordered or approved' but, at the other extreme, if there is only a 'tacit expectation' that overtime is to be performed, this does not constitute official order or approval.

"In between 'tacit expectation' and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of factual possibilities, which is best characterized as 'more than a tacit expectation.' Where the facts show that there is more than only a 'tacit expectation'

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that overtime be performed, such overtime has been found to be compensable as having been 'officially ordered or approved,' even in the absence of a regulation specifically requiring a certain number of minutes of overtime. Where employees have been 'induced' by their superiors to perform overtime in order to effectively complete their assignments and due to the nature of their employment, this overtime has been held to have been 'officially ordered or approved' and therefore compensable. * * * (198 Ct. Cl. at 359)

Therefore, in order to allow Mr. Slade's claim for overtime, there must be a specific order or regulation requiring that he work overtime, or, at least, an "inducement" by his superiors of the overtime worked.

No regulation or order requiring Mr. Slade to work overtime has been presented to us, and there is nothing in the record to suggest that such an order exists. Mr. Slade alleges "inducement" by his superiors by claiming that there was work to be done and that the only way it could be completed was through the use of overtime. This is not sufficient. Mr. Slade's superiors not only deny ordering him to work overtime, they deny even knowing that he did so. We do not find the "inducement" required by the above test. At most there may have been a "tacit expectation," but we do not believe that even that is clearly shown by the record. Accordingly, the disallowance of Mr. Slade's claim by our Claims Division is sustained.

In the request for reconsideration, a claim is asserted for the first time. That claim is:

"In addition, Mr. Slade worked in the west half of Region 8 of the Forest Service under Civil Service classification GS-11, while the person working in the same position in the eastern half carried a GS-12 classification. After Mr. Swofford who worked in the identical position as Lee Slade in the eastern half was injured in an accident, Lee replaced him for 12 to 24 months. He continued to be paid as a GS 11 although he was entitled to GS 12 pay."

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We requested a report from the Forest Service regarding this new claim. That report stated that:

"Apparently the man Mr. Slade claims to have replaced was Thomas F. Swofford, a Forester, GS-12, headquartered in the Regional Office, Atlanta, Georgia. Mr. Swofford was injured in an automobile accident September 15, 1963, and spent considerable time recuperating from the accident. Official records on Mr. Swofford's injury are not available as he retired (optional) on December 28, 1974.

"Mr. Swofford's official position description during the period September 1963/December 1974 described him as 'responsible for initiating, developing and giving direction to, the tree improvement program' in Region 8. Mr. Slade's official position description, covering these same dates, described him as 'Area Supervisor, Tree Improvement Program, screens superior trees in the States of Arkansas, Louisiana, Mississippi, Texas and Oklahoma' for about 33% of his time. He reported to the Timber Management Staff Officer on the Kisatchie National Forest in Louisiana.

"If Thomas F. Swofford is the Mr. Swofford to whom Mr. Slade refers, Mr. Slade was not detailed to Atlanta, Georgia, either at the time of Mr. Swofford's injury or anytime thereafter. In fact, Mr. Slade's official personnel folder does not contain a record of any detail anywhere; nor do we have any record of per diem or other expenses that would normally be incurred as the result of a detail."

Based upon the record before us, we see no basis for even a finding that Mr. Slade was detailed to a higher grade position, let alone a finding that he is entitled to any additional compensation. If Mr. Slade has any additional evidence to support his claim, it should be submitted directly to the Forest Service for investigation and initial resolution.

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If, in fact, the period for which Mr. Slade claims to have been detailed to Mr. Swofford's position was that following Mr. Swofford's 1963 automobile accident, then that claim is probably barred by 31 U.S.C. § 71a (Supp. IV, 1974). Under that section, any claim or demand against the United States is barred unless it is presented to this Office within 6 years from the date such claim accrues. Since this new claim was not received by this Office until February 13, 1976, any element of the claim accruing before February 13, 1970, is barred.

R.F.KELLER

Acting Comptroller General
of the United States